

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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TERESA L. DEPPNER, CLERK
U.S. District Court
Southern District of West Virginia

UNITED STATES OF AMERICA,

Plaintiffs,

v.

Civil Action No. 2:07-0299

COMPLAINT

MASSEY ENERGY COMPANY,
A.T. MASSEY COAL COMPANY,
MASSEY COAL SERVICES, INC.,
ALEX ENERGY, INC., ARACOMA
COAL COMPANY, INC., BANDMILL
COAL CORPORATION, BIG BEAR
MINING COMPANY, CLEAR FORK
COAL COMPANY, DELBARTON
MINING COMPANY, DUCHESS COAL
COMPANY, ELK RUN COAL
COMPANY, INC., GREEN VALLEY
COAL COMPANY, INDEPENDENCE
COAL COMPANY, INC., JACKS
BRANCH COAL COMPANY, LONG
FORK COAL COMPANY, MAJESTIC
MINING, INC., MARFORK COAL
COMPANY, INC., MARTIN COUNTY
COAL CORPORATION, NEW RIDGE
MINING COMPANY, OMAR MINING
COMPANY, PEERLESS EAGLE
COAL CO., PERFORMANCE COAL
COMPANY, POWER MOUNTAIN
COAL COMPANY, RAWL SALES &
PROCESSING, CO., ROAD FORK
DEVELOPMENT COMPANY, INC.,
SIDNEY COAL COMPANY, INC.,
STIRRAT COAL COMPANY, and
TRACE CREEK COAL COMPANY

Defendants.

COMPLAINT

Plaintiff, the United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), files this complaint and alleges as follows:

INTRODUCTION

1. This is a civil action brought pursuant to Section 309(b) and (d) of the Federal Water Pollution Control Act as amended by the Clean Water Act of 1977 and the Water Quality Act of 1987 ("CWA" or the "Act"), 33 U.S.C. §§ 1319(b) and (d). The United States alleges that Defendants discharged and continue to discharge pollutants into waters of the United States in persistent violation of Section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of National Pollutant Discharge Elimination System ("NPDES") permits issued to Massey Energy Company ("Massey Energy") subsidiaries by the State of West Virginia and the Commonwealth of Kentucky (the "States") pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Massey Energy and the subsidiaries named herein ("Defendants") have an extensive history of violating the Clean Water Act, and despite several prior enforcement actions, including two criminal plea agreements, settlement of suspension and debarment matters, civil actions by the State of West Virginia and the Commonwealth of Kentucky, and private suits by citizens in West Virginia and Kentucky, Massey Energy and its subsidiaries continue to violate the CWA.

2. Discharge Monitoring Reports ("DMRs") submitted by Defendants to the State of West Virginia and the Commonwealth of Kentucky show that from January of 2000 through March of 2006, Massey Energy subsidiaries violated the CWA by discharging pollutants in excess of their average monthly or maximum daily permit limits approximately 4,100 times, resulting in approximately 60,534 days of violation. Independent samples taken by West Virginia inspectors

document 534 exceedances of permit limits by Massey Energy subsidiaries from January of 2000 through March of 2006. In addition, Massey Energy subsidiaries received approximately 1,943 Notices of Violation ("NOVs") under the Surface Mining Control and Reclamation Act ("SMCRA") from January of 2000 through March of 2006. At least 255 of these NOVs show violations of the CWA, including 221 that document additional NPDES permits limit violations.

3. Massey Energy and its subsidiaries continue to violate the CWA. DMRs submitted by Massey Energy subsidiaries in West Virginia from April through December of 2006 document approximately 8,537 days of NPDES permit limit violations (276 exceedances of the average monthly permit limits and 257 exceedances of the daily maximum limits).

4. The United States seeks permanent injunctive relief against Defendants to halt their illegal discharges into waters of the United States and civil penalties, as authorized by Section 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and 1319(d).

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action under Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b), and under 28 U.S.C. §§ 1331, 1345 and 1355.

6. Venue is proper in the Southern District of West Virginia pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1395(a), as well as Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b), because it is the judicial district in which Defendants are located, reside, and/or are doing business, and/or in which the violations alleged in the complaint occurred. Venue in this District is also proper under 28 U.S.C. § 1367(a).

7. The States have actual notice of the commencement of this action in accordance with Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

DEFENDANTS

8. Massey Energy is a Delaware corporation with its principal place of business at 4 North 4th Street, Richmond, Virginia.

9. Massey Energy and all subsidiaries named herein are persons within the meaning of Section 502(5) of the Clean Water Act, 33. U.S.C. § 1362(5).

10. At all relevant times Massey Energy directly controlled the coal mining, processing, and shipping operations at all of the facilities owned by its various subsidiaries through approximately twenty-two processing and shipping centers called "Resource Groups."

11. At all relevant times Massey Energy directly financed, managed and controlled environmental compliance at all of the facilities owned by its various subsidiaries through the Resource Groups.

12. At all relevant times, Massey Energy, through A.T. Massey Coal Company, Inc. ("A.T. Massey"), Massey Coal Services, Inc. ("Massey Coal Services"), and its other subsidiaries, did business in West Virginia.

13. A.T. Massey is a Virginia corporation with its principal place of business at 4 North 4th Street, Richmond, Virginia.

14. At all relevant times, A.T. Massey was involved in directing the coal mining operations of Massey Energy subsidiaries, as well as environmental compliance at Massey Energy subsidiaries' facilities.

15. At all relevant times, A.T. Massey, through its subsidiaries, did business in West Virginia.

16. Massey Coal Services, Inc. is a West Virginia corporation with its principal place of

business at 4 North 4th Street, Richmond, Virginia.

17. At all relevant times, Massey Coal Services was involved in directing the coal mining operations of Massey Energy subsidiaries, as well as environmental compliance at Massey Energy subsidiaries' facilities.

18. At all relevant times, Massey Coal Services, through its subsidiaries, did business in West Virginia.

19. Alex Energy, Inc. is a West Virginia corporation doing business at 2 Jerry Road, Drennen, West Virginia.

20. At all relevant times, Alex Energy, Inc. owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 2 Through 322).

21. Aracoma Coal Company, Inc. is a West Virginia corporation doing business at County Route 14, Rum Creek Road, Yolyn, West Virginia.

22. At all relevant times, Aracoma Coal Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 323 Through 337).

23. Bandmill Coal Corporation is a West Virginia corporation doing business at County Route 14, Rum Creek Road, Yolyn, West Virginia.

24. At all relevant times, Bandmill Coal Corporation owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various

numbered outfall points which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 338 Through 420).

25. Big Bear Mining Company is a West Virginia corporation doing business at 4 North 4th Street, Richmond, Virginia.

26. At all relevant times, Big Bear Mining Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 421 Through 467).

27. Clear Fork Coal Company is a West Virginia corporation doing business at 315 70th Street, S.E. Charleston, West Virginia.

28. At all relevant times, Clear Fork Coal Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 468 Through 501).

29. Delbarton Mining Company is a West Virginia corporation doing business at State Route 49 South, Lobata, West Virginia.

30. At all relevant times, Delbarton Mining Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 502 Through 520).

31. Duchess Coal Company is a West Virginia corporation doing business at 4 North 4th Street, Richmond, Virginia.

32. At all relevant times, Duchess Coal Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 521 Through 579).

33. Elk Run Coal Company, Inc. is a West Virginia corporation doing business at Marfork Road, Rte. 3, Pettus, West Virginia.

34. At all relevant times, Elk Run Coal Company, Inc. owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 580 Through 884).

35. Green Valley Coal Company is a West Virginia corporation doing business at 2 Jerry Fork Road, Drennen, West Virginia.

36. At all relevant times, Green Valley Coal Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 885 Through 947).

37. Independence Coal Company, Inc. is a West Virginia corporation doing business at Route 85 South Robinson Creek Road, Madison, West Virginia.

38. At all relevant times, Independence Coal Company, Inc. owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 948 Through 1097).

39. Jacks Branch Coal Company is a West Virginia corporation doing business at 315 70th Street, S.E. Charleston, West Virginia.

40. At all relevant times, Jacks Branch Coal Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 1098 Through 1114).

41. Long Fork Coal Company is a Kentucky corporation doing business at State Route 49 South, Lobata, West Virginia.

42. At all relevant times, Long Fork Coal Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-2 Lines 2 Through 73).

43. Majestic Mining, Inc. is a Texas corporation doing business at 2 Jerry Fork Road, Drennen, West Virginia.

44. At all relevant times, Majestic Mining, Inc. owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 1115 Through 1215).

45. Marfork Coal Company, Inc. is a West Virginia corporation doing business at Marfork Road, Rte. 3, Pettus, West Virginia.

46. At all relevant times, Marfork Coal Company, Inc. owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various

outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 1216 Through 1290).

47. Martin County Coal Corporation is a Kentucky corporation doing business at State Route 49 South, Lobata, West Virginia.

48. At all relevant times, Martin County Coal Corporation owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-2 Lines 74 Through 699).

49. New Ridge Mining Company is a Kentucky corporation doing business at State Route 49 South, Lobata, West Virginia.

50. At all relevant times, New Ridge Mining Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-2 Lines 700 Through 729).

51. Omar Mining Company is a West Virginia corporation doing business at Route 85 South Robinson Creek Road, Madison, West Virginia.

52. At all relevant times, Omar Mining Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 1291 Through 1365).

53. Peerless Eagle Coal Co. is a West Virginia corporation doing business at 2 Jerry Fork Road, Drennen, West Virginia.

54. At all relevant times, Peerless Eagle Coal Co. owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 1366 Through 1497).

55. Performance Coal Company is a West Virginia corporation doing business at Marfork Road, Rte. 3, Pettus, West Virginia.

56. At all relevant times, Performance Coal Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 1498 Through 1532).

57. Power Mountain Coal Company is a West Virginia corporation doing business at 2 Jerry Fork Road, Drennen, West Virginia.

58. At all relevant times, Power Mountain Coal Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 1533 Through 1641).

59. Rawl Sales & Processing, Co. is a West Virginia corporation doing business at State Route 49 South, Lobata, West Virginia.

60. At all relevant times, Rawl Sales & Processing, Co. owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A Lines 1642 Through 1664).

61. Road Fork Development Company, Inc. is a Kentucky corporation doing business at State Route 49 South, Lobata, West Virginia.

62. At all relevant times, Road Fork Development Company, Inc. owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 1665 Through 1677 and Appendix A-2 Line 730 through 762).

63. Sidney Coal Company, Inc. is a Kentucky corporation doing business at State Route 49 South, Lobata, West Virginia.

64. At all relevant times, Sidney Coal Company, Inc. owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-2 Lines 763 Through 1529).

65. Stirrat Coal Company is a West Virginia corporation doing business at State Route 49, South, Lobata, West Virginia.

66. At all relevant times, Stirrat Coal Company owned and operated coal mining, processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 1678 Through 1710).

67. Trace Creek Coal Company is a Pennsylvania corporation doing business at 315 70th Street, S.E. Charleston, West Virginia.

68. At all relevant times, Trace Creek Coal Company owned and operated coal mining,

processing, and/or shipping operations and/or facilities that discharged pollutants from various outfalls (Appendix A) which are subject to the effluent limits as well as monitoring and reporting requirements of NPDES permits (Appendix A-1 Lines 1711 Through 1734).

STATUTORY AND REGULATORY REQUIREMENTS

69. Section 301(a) of the CWA, 33 U.S.C. § 1311(a) prohibits the “discharge of any pollutant by any person” into waters of the United States, except, *inter alia*, in compliance with an NPDES permit issued by EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

70. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the permit issuing authority may issue an NPDES permit that authorizes the discharge of any pollutant directly into waters of the United States, upon the condition that such discharge will meet all applicable requirements of the CWA and such other conditions as the permitting authority determines necessary to carry out the provisions of the CWA.

71. Section 402 of the CWA, 33 U.S.C. § 1342, directs the Administrator to prescribe conditions for NPDES permits to assure compliance with the requirements of the CWA, including conditions on data and information collection, reporting, and such other requirements as the Administrator deems appropriate.

72. Effluent limitations, as defined in Section 502(11) of the CWA, 33 U.S.C. § 1362(11), are restrictions on quantity, rate, and concentration of chemical, physical, biological, and other constituents of wastewater discharges. Effluent limitations are among the conditions and limitations prescribed in NPDES permits issued under Section 402(a) of the CWA, 33 U.S.C. § 1342(a).

73. In 1985, EPA set effluent limitations guidelines (“ELGs”) for discharges from coal

mining point sources. See 40 C.F.R. Part 434, 50 Fed. Reg. 41296-01. The ELGs prescribe “maximum for any 1 day” (“Daily Maximum”) and “average of daily values for 30 consecutive days” (“Monthly Average”) numeric effluent limits for, *inter alia*, Iron, Total Suspended Solids, pH, and Manganese. Discharges with a pH above or below the range set forth in the applicable ELGs (generally within the range of 6.0 to 9.0 at all times) are violations of the daily minimum or daily maximum limits in Defendants’ NPDES permits.

74. Section 303(a) of the CWA, 33 U.S.C. § 1313(a), requires that states adopt ambient water quality standards and establish water quality criteria for particular water bodies that will protect the designated uses of the water. When technology-based ELGs are insufficient to keep receiving waters within those levels, the permit must include stricter water quality based effluent limits that reflect water quality standards and criteria. Section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C).

75. At all times relevant to this complaint, the State of West Virginia, 47 Fed. Reg. 22363-01, and the Commonwealth of Kentucky, 48 Fed. Reg. 45597-02, have been authorized by EPA to administer an NPDES program for regulating the discharges of pollutants into navigable waters within each state’s jurisdiction.

76. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes the Administrator to commence a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, or violates any permit condition or limitation in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

77. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, or violates any permit condition or limitation

in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty payable to the United States of up to \$25,000 per day for each violation.

78. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note; 69 Fed. Reg. 7121 (February 4, 2004), 40 C.F.R. § 19, EPA may seek civil penalties of up to \$27,500 per day for each violation occurring on or after January 30, 1997 through March 15, 2004 and up to \$32,500 per day for each violation occurring after March 15, 2004.

FACTUAL ALLEGATIONS

79. Massey Energy is the fourth largest coal company in the United States by revenue and the largest coal producer in Central Appalachia. Massey Energy owns and operates approximately thirty-one underground mines and approximately sixteen surface mines in West Virginia, Kentucky, and Virginia, selling a total of 42.3 million tons of coal in 2005. Massey Energy controls 2.3 billion tons, or approximately one third, of the proven and probable coal reserves in Central Appalachia.

80. Central Appalachia not only has abundant coal resources, it also contains one of the most biologically diverse and important temperate forests in the world. The aquatic systems in this area are essential to its diversity. In addition to their importance to the diverse plant and animal life, these watersheds are the origins of the drinking water for hundreds of downstream communities, and thousands of people.

81. As a result of their coal mining and processing operations, Massey Energy subsidiaries generate coal slurry, wastewater, and other excess material that are/or contain various "pollutants" as that term is defined in Section 502(6) of the CWA, 33 U.S.C. § 1362(6) and 40 C.F.R. § 122.2, including iron, aluminum, and manganese ("nonconventional" pollutants under

Section 301(g) of the CWA, 33 U.S.C. § 1311(g)), and pH and total suspended solids (“conventional” pollutants as listed in 40 C.F.R. § 401.16).

82. Defendants obtained West Virginia NPDES and Kentucky Pollutant Discharge Elimination System (“KPDES”) permits (Appendices A-1 and A-2) to discharge these pollutants from designated outfall points into streams, rivers, and other waters of the United States.

83. Defendants’ West Virginia NPDES and KPDES permits contain effluent limitations that prohibit discharges of specified pollutants in excess of numeric “average monthly” and/or “maximum daily” limits. These limits reflect ELGs and stricter water quality based effluent limits.

84. Throughout the period relevant to this complaint, from approximately January 2000 through December 2006, Defendants have discharged, and continue to discharge, pollutants in excess of effluent limitations contained in their applicable West Virginia NPDES or KPDES permits from various impoundment and settlement ponds, outfalls, ditches, and other conveyances that are “point sources” within the meaning of Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14).

85. Defendants’ violations of West Virginia NPDES or KPDES permit limits resulted in unauthorized discharges of pollutants into streams, rivers, and other waters of the United States that are “navigable waters” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

A. Violations Reported in Discharge Monitoring Reports

86. Defendants’ West Virginia NPDES and/or KPDES permits impose self-monitoring and self-reporting requirements, including the quarterly submission to the permitting authorities of monthly Discharge Monitoring Reports (“DMRs”) which summarize bi-monthly discharge monitoring data and indicate periods of noncompliance.

87. During the period from January 2000 through March 2006, Defendants reported and

certified in their DMRs approximately 4,100 separate violations of effluent limitations contained in their permits. (List of Self-reported Violations by Company Attached in Appendix A (A-1 and A-2)).

88. Defendants' DMRs show approximately 2,154 violations of Daily Minimum and Daily Maximum effluent limitations, and approximately 1,946 violations of Monthly Average limitations, each of which each represents thirty days of violation.

89. Defendants' DMRs for this period reflect a total of approximately 60,534 days of violation, at a rate of more than 28 violations of the Clean Water Act per day.

90. During the recent nine month period from April through December of 2006, Defendants' DMRs in West Virginia continued to reflect numerous and ongoing violations of effluent limitations contained in their NPDES permits.

91. During this nine month period, Defendants reported approximately 8,537 days of violation in West Virginia. (Appendix B-1).

B. Violations Revealed by Inspector Samples in West Virginia

92. In addition to the self-reported violations in Defendants' DMRs, State of West Virginia inspectors independently took water samples from permitted outfall points at Defendants' facilities to determine whether they were complying with effluent limitations in their permits.

93. During the period from January 2000 through March 2006, inspector samples taken at Defendants' facilities in West Virginia reveal approximately 212 additional violations of minimum and maximum daily limits contained in Defendants' NPDES permits. (Appendix C).

94. Inspector samples taken at Defendants' facilities during this period also independently confirm 322 violations of average monthly limitations reported in Defendants' DMRs. (Appendix

C).

95. During the recent period from April through December of 2006, samples taken by West Virginia inspectors documented 147 (54 Max/Min and 33 Avg.) additional violations of the applicable NPDES permit effluent limitations at Defendants' facilities. (Appendix B-2).

C. Notices of Violation and/or Noncompliance Issued to Defendants

96. West Virginia inspectors issue notices of violation ("NOVs") pursuant to the West Virginia Surface Coal Mining and Reclamation Act ("WVSMCRA"), W.VA. CODE § 22-3-17 (2004), and Kentucky inspectors issue notices of noncompliance ("NONs") pursuant to the Kentucky Surface Mining Act ("KSMA"), KY. REV. STAT. ANN. § 350.130 (Michie 2004) (NOVs and NONs collectively referred to herein as "NOVs") to persons engaging in mining operations who violate any rules promulgated or permits issued under either Act. Permits issued under WVSMCRA and KSMA require compliance with NPDES effluent limitations and incorporate such limitations by reference.

97. In addition to the self-reported violations in Defendants' DMRs, NOVs issued by West Virginia and Kentucky inspectors from January 2000 through March 2006 show that Massey Energy subsidiaries discharged pollutants in violation of limitations contained in their NPDES permits. These NOVs also document other permit violations and/or non-permitted discharges such as visible spills of oil, slurry, blackwater, and other pollutants into waters of the United States.

98. From January 2000 through March 2006, the Defendants listed in Appendix D were issued at least 219 NOVs showing violations of NPDES permit conditions and/or non-permitted water discharge-related violations in West Virginia, and at least 36 NOVs for either violating NPDES permit conditions and/or unpermitted water discharge-related violations in Kentucky. (Appendices D-1 and D-2). Recent NOVs issued to Defendants in West Virginia from April through

December 2006 (Appendix B-3) document 21 additional violations of NPDES permit conditions or unpermitted discharges into waters of the United States.

99. These NOV's include approximately 240 separate NOV's for exceeding effluent limitations contained in the relevant Defendants' NPDES permits. These NOV's also include 35 separate NOV's that document either violations of NPDES permit conditions or unpermitted discharges into waters of the United States in violation of Section 301 of the CWA, 33 U.S.C. § 1311. Such violations were observed by state inspectors and described in narratives in the NOV's issued to Defendants.

100. The NOV's, listed in Appendices B-3, D-1, and D-2, document a range of permit violations and unpermitted discharges that caused varying degrees of harm, including *inter alia*: (1) unpermitted coal slurry spills that coated waterways (e.g. KYSMCRA permit no. 8985168, violation #530493 (discharge of coal slurry turned creek black for 10 miles)); (2) unpermitted discharges that discolored rivers and streams (e.g. WVSMCRA permit no. S508486, violation #28 (discharge discolored Copperas Mine Fork for one mile)); and (3) unpermitted discharges that visibly stained waterways (e.g. WVSMCRA permit no. U304292, violation #9 (discharge stained West Fork with deposits of iron sediment for approximately 3.5 miles)); (WVSMCRA permit no. S000985, violation #6 (discharge stained Whitman Creek with a yellow/orange sludge)).

History of Violations And Enforcement Efforts

101. Massey Energy and its subsidiaries have a long history of noncompliance with the CWA.

102. In addition to the thousands of self reported NPDES violations (Appendices A-1 and A-2) and the hundreds of permit violations and unpermitted discharges documented by state

inspectors over the past five years (Appendices B-3, C, D), historically Massey has been responsible for significant black water spills and has been subject to federal and state CWA enforcement actions.

103. Martin County Coal Corporation, a Massey subsidiary, is responsible for one of the largest coal slurry spills in United States history. In October of 2000, an estimated 306 million gallons of coal slurry drained from the Big Branch impoundment at Martin County Coal Corporation into an adjacent underground mine, near Inez, KY. Approximately 245 million gallons of water and coal slurry spilled from the mine and ultimately made its way into the Ohio River at Ashland, KY.

104. On December 16, 2002, Omar Mining Company and Independence Coal Company, plead guilty to negligently violating Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342 in the U.S. District Court for the Southern District of West Virginia, and were each sentenced to five years probation and fines of \$200,000.

105. Prior to the entry of these two guilty pleas, Massey Energy, Independence Coal Company, and Omar Mining Company entered into an agreement with the U.S. EPA Suspension and Debarment Division to resolve matters related to suspension and debarment pursuant to 48 C.F.R. Subpart 9.4 and 40 C.F.R. Part 32, and statutory disqualification, pursuant to § 508(a) of the CWA, 33 U.S.C. 1368(a). This agreement mandated implementation of a company-wide environmental compliance program, training, independent environmental audits, adequate funding and staffing for environmental compliance, additional reporting requirements of discharges to surface water, and other conditions.

106. The Suspension and Debarment agreement also recited several other major violations by Massey Energy subsidiaries, between 2000 and 2002. These included: (1) an October 2000 spill from a Martin County Coal Corporation facility; (2) an August 2001 spill of coal slurry from a

Bandmill Coal Corporation facility into Rum Creek following a break in a line associated with a slurry injection point; (3) an April 2002 coal slurry spill into the Tug Fork of Big Sandy River following a break in a coal slurry line at a Long Fork Coal Company facility; (4) erosion of a valley fill at a Bandmill Coal Corporation facility that resulted in flow of mud and water which damaged the property of numerous private individuals; (5) a July 2002 spill at an Alex Energy, Inc. facility due to an opening in a berm; and (6) an October 2002 coal slurry spill into Dehue Creek from a Bandmill Coal Corporation facility.

107. In April of 2006, WVDEP settled lawsuits filed against Massey subsidiaries Independence Coal Company, Omar Mining Company, Marfork Coal Company, and Bandmill Coal Corporation for numerous discharges of pollutants into state waters in violation of the West Virginia Water Pollution Control Act. The Massey subsidiaries agreed to pay civil penalties, and to suspend activities at Marfork for two 3-day consecutive time periods. The settlement pertained to violations up to and including November 30, 2005.

108. In the period since November 30, 2005, the four subsidiaries included in the April 2006 settlement have continued to discharge pollutants into waters of the United States in violation of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, as reflected in certified DMRs and numerous NOV's. (DMR violations listed in Appendix E-1 Lines 338 through 345 (Bandmill), Lines 966 through 1030 (Independence), Lines 1187 through 1208 (Omar), Lines 1146 through 1186 (Marfork). NOV's for these four companies from December 2005 through April 2006 are listed with other Defendants' violations in Appendices G-1 and G-2.

109. Despite this history of CWA violations and enforcement efforts by federal, state, and local authorities, Massey Energy and its subsidiaries continue to violate the CWA, and remain in substantial noncompliance with the law.

FIRST CLAIM FOR RELIEF
(Violations From Discharge Monitoring Reports)

110. Paragraphs 1-109 are realleged and incorporated by reference.

111. Defendants' DMRs document that on numerous occasions in Kentucky from January 2000 through March 2006 and West Virginia from January 2000 through December 2006, Defendants discharged pollutants from various outfalls (Appendices A-1 and A-2) into waters of the United States in violation of NPDES permit limits and Section 301 of the Act, 33 U.S.C. § 1311.

112. Defendants' DMRs report approximately 2,411 violations of minimum and maximum daily effluent limitations.

113. Defendants' DMRs report approximately 2,222 violations of monthly average limitations, which each represent 30 separate days of violation of the CWA.

114. Defendants' DMRs report a total of approximately 69,071 separate days of violations of the CWA.

115. Unless enjoined, Defendants' violations will continue.

116. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), Defendants are liable for permanent injunctive relief.

117. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), Elk Run Coal Company, Inc., Sidney Coal Company, Inc., and Martin County Coal Corporation are liable for civil penalties of up to \$27,500 per day of violation for all violations occurring from January 2000 through March 15, 2004, and up to \$32,500 per day of violation for all violations occurring after March 15, 2004. (Appendix E-1 Lines 493 through 892 (Elk Run); Appendix E-2 Lines 714 through 1493 (Sidney), Lines 34 through 659 (Martin County)).

118. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), Independence Coal Company, Inc., Omar Mining Company, Bandmill Coal Corporation, and

Marfork Coal Company, Inc. are liable for civil penalties of up to \$32,500 per day for each violation of the CWA or any applicable NPDES permit that occurred after November 30, 2005 (the final date covered by the State of West Virginia's Settlement with these four subsidiaries). (Appendix E-1 Lines 966 through 1030 (Independence), Lines 1187 through 1208 (Omar), Lines 338 through 345 (Bandmill), Lines 1146 through 1186 (Marfork)).

119. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), all Defendants, except Independence Coal, Omar Coal, Bandmill Coal Corporation, Marfork Coal Company, Inc., Elk Run Coal Company, Inc., Sidney Coal Company, Inc., and Martin County Coal Corporation (addressed in Paragraphs 117 and 118) are liable for civil penalties of up to \$27,500 per day of violation for all violations occurring from January 2002 through March 15, 2004, and up to \$32,500 per day of violation for all violations occurring after March 15, 2004. (Appendices E-1 and E-2).

SECOND CLAIM FOR RELIEF
(Violations From Inspector Samples)

120. Paragraphs 1-119 are realleged and incorporated by reference.

121. In addition to the violations alleged in the First Claim for Relief, on numerous occasions from January 2000 through December of 2006, Massey Energy subsidiaries discharged pollutants from various outfalls (Appendices B-2 and C) into waters of the United States in violation of their NPDES permit limits and Section 301 of the CWA. Such discharges are reflected in samples taken by West Virginia state inspectors at Massey Energy facilities.

122. Samples taken by inspectors at Massey Energy facilities include 266 violations of maximum and minimum daily effluent limitations.

123. Unless enjoined, Defendants' violations will continue.

124. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), all

Defendants are liable for permanent injunctive relief.

125. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), Elk Run Coal Company, Inc. is liable for civil penalties of up to \$27,500 per day of violation for all violations occurring from January 2000 through March 15, 2004, and up to \$32,500 per day of violation for all violations occurring after March 15, 2004. (Appendix F Lines 87 through 223).

126. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), Independence Coal Company, Inc., Omar Mining Company, Bandmill Coal Corporation, and Marfork Coal Company, Inc., are liable for civil penalties of up to \$32,500 per day for each violation of the CWA or any applicable NPDES permit that occurred after November 30, 2005 (the final date covered by the State of West Virginia's Settlement with these four subsidiaries). (Appendix F Lines 248-275 (Independence), Lines 301-303 (Omar), Lines 74-75 (Bandmill), Lines 297-300 (Marfork)).

127. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), all Defendants, except Independence Coal Company, Inc., Omar Mining Company, Bandmill Coal Corporation, Marfork Coal Company, Inc., and Elk Run Coal Company, Inc. (addressed in Paragraphs 125 and 126) are liable for civil penalties of up to \$27,500 per day of violation for all violations occurring from January 2002 through March 15, 2004, and up to \$32,500 per day of violation for all violations occurring after March 15, 2004. (Appendix F).

THIRD CLAIM FOR RELIEF

(Notices of Violation For Exceeding NPDES Permit Limitations)

128. Paragraphs 1-127 are realleged and incorporated by reference.

129. In addition to the violations alleged in the First and Second Claims for Relief, Massey Energy and its subsidiaries have received numerous NOVs for exceeding NPDES permit limitations in both West Virginia and Kentucky. (Appendix D).

130. Unless enjoined, Defendants' violations will continue.

131. Such notices of violation each reflect a violation of Section 301 of the CWA, 33 U.S.C. § 1311, or Section 402 of the CWA, 33 U.S.C. § 1342.

132. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), all Defendants are liable for permanent injunctive relief.

133. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), Elk Run, Sidney Coal Co., and Martin County Coal are liable for civil penalties of up to \$27,500 per day of violation for all violations occurring from January 2000 through March 15, 2004, and up to \$32,500 per day of violation for all violations occurring after March 15, 2004.

134. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), Independence Coal Company, Inc., Omar Mining Company, Bandmill Coal Corporation, and Marfork Coal Company, Inc. are liable for civil penalties of up to \$32,500 per day for each violation of the CWA or any applicable NPDES permit that occurred after November 30, 2005 (the final date covered by the State of West Virginia's Settlement with these four subsidiaries).

135. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), all Defendants, except Independence Coal Company, Inc., Omar Mining Company, Bandmill Coal Corporation, Marfork Coal Company, Inc., Elk Run Coal Company, Inc., Sidney Coal Company, Inc., and Martin County Coal Corporation (addressed in Paragraphs 133 and 134) are liable for civil penalties of up to \$27,500 per day of violation for all violations occurring from January 2002 through March 15, 2004, and up to \$32,500 per day of violation for all violations occurring after March 15, 2004. (Appendices G-1 and G-2 (listing NOV's that document NPDES permit violations as well as unpermitted discharges)).

FOURTH CLAIM FOR RELIEF

(Notices of Violation for Unpermitted Discharges into Waters of the United States)

136. Paragraphs 1-135 are realleged and incorporated by reference.

137. Massey Energy and its subsidiaries have discharged and continue to discharge pollutants into waters of the United States from point sources which are not authorized to discharge by a permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Defendants have received numerous NOVs for such violations in both West Virginia and Kentucky.

138. Unless enjoined, Defendants' violations will continue.

139. Such notices of violation each reflect a violation of Section 301 of the CWA, 33 U.S.C. § 1311.

140. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), all Defendants are liable for permanent injunctive relief.

141. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), Elk Run, Sidney Coal Co., and Martin County Coal are liable for civil penalties of up to \$27,500 per day of violation for all violations occurring from January 2000 through March 15, 2004, and up to \$32,500 per day of violation for all violations occurring after March 15, 2004.

142. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), Independence Coal Company, Inc., Omar Mining Company, Bandmill Coal Corporation, and Marfork Coal Company, Inc. are liable for civil penalties of up to \$32,500 per day for each violation of the CWA or any applicable NPDES permit that occurred after November 30, 2005 (the final date covered by the State of West Virginia's Settlement with these four subsidiaries).

143. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), all Defendants, except Independence Coal Company, Inc., Omar Mining Company, Bandmill Coal Corporation, Marfork Coal Company, Inc., Elk Run, Sidney Coal Co., and Martin County Coal (addressed in Paragraph 141 and 142) are liable for civil penalties of up to \$27,500 per day of violation for all violations occurring from January 2002 through March 15, 2004, and up to \$32,500


per day of violation for all violations occurring after March 15, 2004. (Appendices G-1 and G2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America respectfully pray that this Court:

1. Permanently enjoin Defendants from discharging pollutants except as expressly authorized by the CWA and the limitations and conditions of Defendants' applicable NPDES Permits.
2. Order Defendants named herein and subsidiaries acquired or incorporated by Massey Energy in the future, to take all necessary steps to comply with the CWA and the limitations and conditions of the applicable NPDES Permits.
3. Assess civil penalties against Elk Run Coal Company, Inc., Sidney Coal Company, Inc. and Martin County Coal Corporation up to \$27,500 per day for each violation of the CWA or any applicable NPDES permit that occurred from January of 2000 through March 15, 2004, and up to \$32,500 per day for each violation of the CWA or any applicable NPDES permit that occurred after March 15, 2004.
4. Assess civil penalties against Independence Coal Company, Inc., Omar Mining Company, Bandmill Coal Corporation, and Marfork Coal Company, Inc. up to \$32,500 per day for each violation of the CWA or any applicable NPDES permit that occurred after November 30, 2005.
5. Assess civil penalties against all Defendants except Independence Coal Company, Inc., Omar Mining Company, Bandmill Coal Corporation, Marfork Coal Company, Inc., Elk Run Coal Company, Inc., Sidney Coal Company, Inc., and Martin County Coal Corporation up to \$27,500 per day for each violation of the CWA or any applicable NPDES permit that occurred from January of 2002 through March 15, 2004, and up to \$32,500 per day for each violation of the CWA or any applicable NPDES permit that occurred after March 15, 2004.
5. Award the United States their costs for this action.

6. Grant such other relief as the Court may deem appropriate.

Respectfully submitted, 

MATTHEW J. MCKEOWN
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
Washington, DC 20530

JEFFREY D. TALBERT
Trial Attorney
NATHANIEL DOUGLAS
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044

OF COUNSEL

ROBERT KLEPP
ATTORNEY
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 2243A
Washington, DC 20460